STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 276424 Wayne Circuit Court
TERRANCE BAILEY, Defendant-Appellant.	LC No. 06-008894-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 276593 Wayne Circuit Court
TERRANCE BAILEY, Defendant-Appellant.	LC No. 06-006406-01

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

In LC No. 06-008894-01, defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c), and kidnapping, MCL 750.349. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to three concurrent prison terms of 40 to 60 years for each conviction, and appeals those convictions and sentences as of right in Docket No. 276424. In LC No. 06-006406-01, defendant was convicted by a separate jury of four counts of first-degree CSC, MCL 750.520b(1)(c), one count of second-degree CSC, MCL 750.520c(1)(c) and one count of kidnapping. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 30 to 50 years for each of the first-degree CSC and kidnapping convictions and 10 to 15 years for the second-degree CSC conviction, and appeals those convictions and sentences as of right in Docket No. 276593. The appeals have been consolidated for consideration by this Court. We affirm defendant's convictions in both cases, remand for resentencing in Docket No. 276424, and remand for correction of the judgment of sentence in Docket No. 276593.

In LC No. 06-008894-01, defendant was convicted of kidnapping and sexually assaulting DH on May 9, 2006. In LC No. 06-006406-01, defendant was convicted of kidnapping and sexually assaulting AH on May 10, 2006. Both victims were abducted by a man driving a white truck, in the same general area in Detroit, while on their way to school, and both were transported to a house where they were sexually assaulted. Although the two cases were tried separately, each victim testified at the trial involving the other victim pursuant to MRE 404(b)(1). In addition, a third person, TB, also testified at both trials pursuant to MRE 404(b)(1). TB testified that she was abducted by defendant, who was driving a white truck, on May 18, 2006, while at a school bus stop in Detroit. TB was able to escape from defendant's vehicle when defendant stopped for a red traffic light. She then ran to a nearby restaurant and contacted the police. The police arrested defendant later that day. DH, AH, and TB each subsequently identified defendant at a police lineup.

I. Admissibility of Other Acts Testimony Under MRE 404(b)(1)

Defendant argues that the trial court erred in admitting TB's testimony at both trials, and in admitting the testimony of DH and AH at the trials involving the other under MRE 404(b)(1). We disagree.

We review the trial court's decision to admit testimony under MRE 404(b)(1) for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

MRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts to prove a defendant's character to show action in conformity therewith, but allows such evidence for other purposes to prove something other than the defendant's bad character. The logic behind this rule is that a jury should not convict a defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court, upon request, may provide a cautionary instruction regarding the limited use of any evidence admitted under MRE 404(b). *Id*. at 75.

Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994).

The prosecution has the initial burden of establishing the relevancy of the proposed evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable

inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Id*., quoting *Crawford, supra* at 387; MRE 401.

The prosecution offered the other acts testimony to prove a scheme, plan, or system in doing an act. In *Knox, supra* at 510-511, our Supreme Court explained:

> In *People v Sabin (After Remand),* 463 Mich 43; 614 NW2d 888 (2000), this Court specifically examined the exception in MRE 404(b) for evidence showing a "scheme, plan, or system." We clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin, supra* at 63. We cautioned both that "[l]ogical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception of plot," and that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id*. at 64.
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> These decisions continue to form the foundation for a proper analysis of MRE 404(b). The case upon which the instant Court of Appeals majority placed so much emphasis, [*People v Hine,* 467 Mich 242; 650 NW2d 659 (2002)], focused very specifically and narrowly on a particular application of the "scheme, plan, or system" principles discussed in *Sabin* to the facts presented. This Court concluded in *Hine* that the Court of Appeals had improperly imposed a standard of a high degree of similarity between the proffered other acts of the defendant and the charged acts. Specifically, this Court observed that the particular type of assaults on the defendant's former girlfriends were sufficiently similar to the method or system that could have caused the marks on the child victim to be admissible in that case. The trial court, therefore, did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding the child victim shared sufficient common features to permit the inference of a plan, scheme, or system. [Footnote omitted.]

The prosecution also offered the testimony to prove defendant's identity as the perpetrator. In *People v Ho,* 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court stated:

> Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz,* 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi. *People v McMillan,* 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra* at 307-309.

The other acts testimony in these cases consisted of the testimony of TB and AH in the case involving the charges related to DH, and the testimony of TB and DH in the case involving the charges related to AH.

The testimony established that TB, AH, and DH were all similar in age and were approached by the same man while on their way to school. All three incidents occurred within a nine-day period, in the same general area in Detroit, at approximately the same time of day, and were committed while the man was driving a white truck. There were sufficient similarities between the offenses to establish a plan, scheme, or system in committing the acts. We disagree with defendant's argument that TB's testimony was too dissimilar to be admitted in either case because she did not testify regarding any sexual acts. AH and DH both testified that defendant drove them to a house where they were sexually assaulted. As with AH and DH, defendant was driving TB to another location when she managed to escape from his vehicle. TB's successful escape does not negate the many similarities between the three incidents to preclude a finding that they were all part of a common scheme, plan, or system.

Further, we disagree with defendant's argument that the probative value of TB's testimony was substantially outweighed by the danger of unfair prejudice. Although defendant characterizes TB's testimony as unnecessary overkill, it was her testimony that explained how the police were able to link defendant to the crimes involving AH and DH. TB's escape led to defendant's arrest later that day, following which AH and DH both identified defendant in a police lineup. In addition, the trial court gave a cautionary instruction advising the jury on the limited purpose of the testimony, thereby minimizing any potential for unfair prejudice.

Accordingly, the trial court did not abuse its discretion in allowing the other acts testimony under MRE 404(b)(1).[1]

II. Trial Court's Reference to a Dismissed Charge in LC No. 06-008894-01

In Docket No. 276424, defendant also argues that he was prejudiced when the trial court mistakenly stated during jury selection that defendant had also been charged with failing to inform a sexual partner that he was HIV positive, MCL 333.5210. Immediately after making this statement, a bench conference was held at which the court was informed that the HIV-related charge was dismissed at the preliminary examination. The trial court then advised the jury that defendant had not been charged with that offense and instructed the jury not to consider it. Later, after the attorneys' opening statements and in the court's final instructions to the jury, the court again instructed the jury that defendant was not charged with the HIV-related crime, that it was not to be considered, and that the jury was to ignore the court's prior misstatement. Juries are presumed to follow their instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Thus, defendant is not entitled to relief.

[1] Although defendant also refers to MCL 768.27a in his argument, neither the prosecution nor the trial court relied on this statute as a basis for admitting TB's testimony. Further, because we conclude that TB's testimony properly was admitted under MRE 404(b)(1), it is unnecessary to consider MCL 768.27a.

III. Newly Discovered Evidence

Defendant argues that he is entitled to a new trial in both cases based on newly discovered evidence. A motion for a new trial based on newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Here, defendant did not move for a new trial. Therefore, this issue is not preserved. Defendant alternatively requests a remand for an evidentiary hearing on this issue.

To be entitled to a new trial based on newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

The alleged new evidence in these cases is the closure of the Detroit Police Department's Forensic Services Division, which was closed in September 2008 because of errors and inconsistencies by firearms examiners. Although no firearms evidence was presented in either case here, defendant asserts that there is a possibility that the police department may have mishandled the rape-kit evidence, resulting in the loss of potentially exculpatory DNA evidence. However, defendant offers no support for his contention that evidence was mishandled. More significantly, he has not provided any basis for believing that there is a reasonable probability that further DNA testing might produce favorable evidence let alone cause a different result. In both cases, the DNA evidence was inconclusive. The forensic examiner testified that the samples in both cases revealed trace amounts of semen, but no sperm cells, which made testing for a DNA profile difficult. Although AH's underwear contained a trace amount of male DNA, the examiner was not able to draw any conclusions from it. No male DNA was found in AH's sample. Thus, in neither case was DNA evidence used to link defendant to the charged crimes. Defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is misplaced. Although *Brady* establishes that a criminal defendant has a due process right to the disclosure of favorable evidence, there is no basis for finding that any favorable evidence was suppressed in these cases.

Accordingly, defendant has not demonstrated any basis for relief with respect to this issue.

IV. Police Intimidation

In Docket No. 276424, defendant argues that police intimidation improperly influenced DH's testimony, thereby violating his right to due process. Defendant concedes that this issue was not raised below and, therefore, is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also argues, however, that defense counsel was ineffective for not moving to suppress DH's testimony on the ground that it was improperly influenced by the police.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *Pickens*, *supra* at 338. Defendant must overcome the presumption that the challenged action might be considered sound

trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), lv den 439 Mich 902 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The record does not support defendant's argument that the police attempted to influence DH's testimony. In support of this argument, defendant relies on DH's testimony on cross-examination in which she stated that she told the police that defendant's residence was three or four houses from the corner of Chicago Street, and that the police told her that was not the right house. This testimony merely indicates that the police informed DH that information she had provided was not correct. DH admitted that she could not identify the exterior of defendant's house or accurately describe its location because she was forced to keep her head down while defendant drove to the house. There is no indication that the police or anyone else conveyed any information about the case to DH or asked her to testify in a particular manner. Thus, there is no merit to this issue. Because there is no record support for defendant's claim that DH's testimony was improperly influenced, defense counsel was not ineffective for failing to pursue this issue. *Darden, supra* at 605.

V. Defendant's Habitual Offender Sentences in LC No. 06-008894-01

In Docket No. 276424, defendant argues that he was improperly sentenced as a fourth habitual offender in LC No. 06-008894-01. The presentence report supports defendant's argument that he had only two prior felony convictions at the time the offenses were committed. Plaintiff concedes that defendant is subject to sentence enhancement only as a third habitual offender, MCL 769.11, and that resentencing is required. We therefore vacate defendant's sentences in LC No. 06-008894-01 and remand for resentencing.

VI. Defendant's Judgment of Sentence in LC No. 06-006406-01

In Docket No. 276593, defendant argues that remand is required to correct clerical errors in his judgment of sentence in LC No. 06-006406-01.

Although defendant was sentenced on October 24, 2006, the judgment of sentence contains a "sentence date" of October 20, 2006, and a "date sentence begins" date of October 27, 2006. Plaintiff concedes that the judgment of sentence does not accurately reflect the date that defendant's sentences were imposed and that remand for correction of the clerical errors in the judgment is appropriate. We therefore remand for this purpose. Resentencing is not required. MCR 6.435(A).

VII. Conclusion

In sum, we affirm defendant's convictions in both cases. In addition, in Docket No. 276424, we vacate defendant's sentences in LC No. 06-008894-01 and remand for resentencing. Lastly, in Docket No. 276593, we remand for correction of the clerical errors in defendant's judgment of sentence in LC No. 06-006406-01 in accordance with this opinion.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio